

NTSB Order No. EA-3761

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 29th day of December, 1992

Respondent .

Docket SE-10754

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on September 19, 1990, following an evidentiary hearing.¹ The law judge affirmed an order of the Administrator suspending respondent's commercial pilot certificate for 60 days. We deny the appeal.

5932

The Administrator's order charged respondent with violations of 14 C.F.R. 91.75(b), 91.87(h), and 91.9 in connection with an incident on June 29, 1989, immediately following his landing at Centennial Airport, Englewood, CO.² At the hearing, the controller testified that he gave respondent certain taxi instructions, which respondent acknowledged.³ Respondent allegedly did not comply with the instructions. When approximately 3 minutes later, the controller noticed that the aircraft was not moving, he contacted it again and repeated the clearance, which respondent again acknowledged. Tr. at 12, 15

²Respondent admits he was pilot in command of the aircraft at issue.

§ 91.75(b) (now 91.123) provided, as pertinent:

(b) Except in an emergency, no person may operate an aircraft contrary to an ATC [air traffic control] instruction in an area in which air traffic control is exercised.

§ 91.87(h) (now 91.129) read:

Clearances required. No person may, at an airport with an operating control tower, operate an aircraft on a runway or taxiway, or take off or land an aircraft, unless an appropriate clearance is received from ATC. A clearance to "taxi to" the takeoff runway assigned to the aircraft is not a clearance to cross that assigned takeoff runway or to taxi on that runway at any point, but is a clearance to cross other runways that intersect the taxi route to that assigned takeoff runway. A clearance to "taxi to" any point other than an assigned takeoff runway is a clearance to cross all runways that intersect the taxi route to that point.

§ 91.9 (now 91.13(a)) provided:

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

³The instructions are depicted on Exhibit C-1.

and Exhibit C-2.⁴ Respondent began taxiing, the controller testified, but did not follow the directions he had been given. As a result, respondent's aircraft crossed an active runway on which a takeoff roll was in progress. Respondent admitted his failure to follow the instructions (Tr. at 36), but claims he was left in a position in which he had no choice but to violate them.

He states that he sat in the aircraft for 15-20 minutes on the wrong side of the taxiway on which he was supposed to turn and that, being unable to contact the tower by radio, being unable to turn around, and being concerned his engines were overheating, he finally proceeded ahead and crossed the runway.⁵ Respondent implied that the controller was at fault, having made numerous communication errors, and that the tower tape had been tampered with.

The law judge refused to credit any of respondent's explanations, finding them unsupported by any credible evidence.

We agree, and on appeal, respondent offers no basis to reverse the initial decision.

Respondent first contends that the law judge erred in denying his motion to sequester the witnesses. This claim is frivolous, and respondent offers no indication of how he was

⁴Exhibit C-2 is a summary of that portion of the tower tape (approximately 5 minutes) during which ATC's two conversations with respondent occurred.

⁵The controller was unable to state on which side of the taxiway respondent was located. By the same token, however, respondent acknowledged that, during the second conversation with ATC, he had not said that he was past the turning point.

harm by the conduct of the hearing. Not only did the Administrator have only one witness (and, thus, we can discern no purpose in sequestration), but the law judge ultimately granted the motion when he said: "if anyone comes in we'll exclude them [sic]." Tr. at 6. Moreover, respondent, in effect, withdrew his request when the law judge pointed out that a sequester order would lead to exclusion of respondent's own witnesses. Id.

Respondent's other arguments are equally meritless. He argues that the law judge erred in failing to account for respondent's physical inability to comply with the taxi instructions. This argument has two flaws. First, there is no dispute that respondent was able to comply with the instructions when they were first given. The evidence shows that he failed to turn onto the designated taxiway because he "did not notice a sign" for that taxiway (Exhibit C-3) and, therefore, taxied past the point he was directed to turn. This failure on respondent's part, in and of itself, constituted a violation of the cited regulations. Second, even assuming arguendo that respondent could not turn the aircraft towards the taxiway on which he was cleared, could not contact ATC, and needed to act because his engines were overheating, respondent has not excused his continuing forward and crossing an active runway without a clearance to do so.⁶

⁶There is no documentary evidence to support any of these claims. For example, there is no indication that after the incident respondent sought to have the radios checked -- a routine act if he believed they had, in fact, malfunctioned. And, the tape's indication that only 3 minutes passed between the

Finally, respondent argues that the law judge improperly failed to consider either the unacceptable performance of the controller or the testimony contesting the validity of the tape and the controller's testimony. The law judge did, however, consider these matters, finding respondent's testimony on them unconvincing. Not only does respondent fail to demonstrate that the law judge's credibility findings are reversible error, respondent's allegations again have no support in the record.⁷ Although respondent testified to his belief that the controller made numerous mistakes in "phraseology," the controller was not cross-examined on this matter and respondent offered no supporting documentary evidence, such as the tape itself or a complete or partial transcript of it with examples of such errors. Similarly, absent the tape or a complete transcript of the relevant portion, we cannot credit respondent's bald allegation that the tape was tampered with.⁸

In any case, even were the new evidence accepted and the
 (..continued)
 two conversations with ATC belies the claim of engine
 overheating.

⁷See Administrator v. Smith, 5 NTSB 1560, 1563 (1987). We note that, in weighing the credibility of the witnesses, the law judge was faced with inconsistencies even in respondent's position as between his testimony at the hearing and his earlier letter (Exhibit C-3) to the FAA.

⁸In his appeal brief, respondent for the first time offered details of the controller's alleged mistakes, and what might be a transcript of the tower tape. Despite the Administrator's unexplained failure to move to strike this material, it is new evidence that may not now be considered. Administrator v. Richards, 3 NTSB 2098, 2099 (1979) and Administrator v. Smith, NTSB Order EA-3558 (1992), at 5.

allegations of controller errors assumed, not a shred of evidence shows that ATC contributed in any way to respondent's actions.

Instead, as the law judge found,

there is no credible evidence to indicate any type of involvement by ATC in this occurrence. . . . the evidence does not support the contention that the aircraft sat there for 15 to 20 minutes. The credible evidence in front of me is that the aircraft received a clearance, and within three minutes thereafter, proceeded across 17 Left without a clearance from ATC. . . .

Tr. at 72.

Respondent was not, as he claims, a victim of the ATC system. Respondent, for whatever reason, failed to comply with the ATC instruction and, having put himself in that position, compounded the violation by proceeding across an active runway. We affirm the law judge's findings and order.⁹

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The 60-day suspension of respondent's commercial pilot certificate shall begin 30 days from the date of service of this order.¹⁰

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁹Respondent does not directly challenge imposition of the sanction despite his filing of an Aviation Safety Reporting Program report. We, nevertheless, agree with the law judge that sanction waiver is inappropriate here, given the circumstances.

¹⁰For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).